



**Comptroller General  
of the United States**

**Washington, D.C. 20548**

## **Decision**

**Matter of:** Contact International Corporation

**File:** B-237122.3; B-237122.4

**Date:** December 3, 1990

William E. Franczek, Esq., Vandeventer, Black, Meredith & Martin, for the protester.  
David M. Eppsteiner, Esq., McKenna & Cuneo, for Servrite International, Ltd., an interested party.  
Lieutenant Colonel William J. Holland, Department of the Air Force, for the agency.  
Scott Riback, Esq., Andrew T. Pogany, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### **DIGEST**

1. Protest that agency, in taking corrective action to remedy previously improper procurement, is engaged in improper auction technique is denied. Fact that agency did not ultimately make various changes in its requirements, as agency represented it would do, does not affect the need for appropriate corrective action in cases where explicit statutory violations have occurred, and this need takes primacy over possible risk of auction.
2. Agency did not engage in improper technical transfusion by permitting competitor of protester to conduct a site visit to a government-owned facility at which protester was incumbent.
3. Protester's revised offer was properly rejected as late where revised offer was not a modification of an otherwise successful offer which proposed terms more favorable than those contained in original offer.

### **DECISION**

Contact International Corporation protests the amended terms of request for proposal (RFP) No. F62562-89-R-0130, issued by the Department of the Air Force for services in connection

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with the operation of a dairy plant and the production of various milk products at Yokota Air Force Base in Japan. Contact argues that the revised RFP causes an impermissible auction situation and that the Air Force engaged in an improper technical transfusion. Contact also protests that the Air Force improperly rejected as late the firm's revised offer submitted in response to the amended RFP.

We deny the protests.

The RFP was originally issued in June 1989, and called for the submission of offers to operate a dairy plant in Yokota, Japan. In response to the original RFP, Servrite International, Ltd. and Contact submitted offers and, after evaluation and discussions with Servrite, the Air Force made award to Contact as the firm submitting the lowest overall cost offer. Subsequent to the agency's award of a contract to Contact, Servrite protested to our Office that the award was improper. In response to that protest, the agency ultimately concluded that it had engaged in improper discussions with Servrite and submitted a request to our Office to dismiss the protest. In that request, the Air Force proposed to take corrective action in the form of amending the RFP to allow discussions with both firms and the submission of best and final offers (BAFO). On the basis of the Air Force's request, we denied Servrite's protest on the ground that either the original award to Contact was proper (if, in fact, the Air Force's communications with Servrite were not discussions and award had therefore been made on the basis of initial proposals to the lowest priced firm) or the agency had engaged in improper discussions with only one offeror (and its proposed corrective action was appropriate). See Servrite Int'l, Ltd., B-237122, Jan. 4, 1990, 69 Comp. Gen. \_\_\_\_, 90-1 CPD ¶ 15.

In response to that decision, Contact filed a request for reconsideration with our Office. Specifically, Contact argued that the agency's communications with Servrite were clarifications rather than discussions and also that the agency's proposed corrective action would result in an impermissible auction since both firms' prices had been revealed during the initial protest. We denied Contact's protest, concluding that the agency had engaged in improper discussions with only one firm and also concluding that the risk of an auction was secondary to maintaining the integrity of the competitive procurement system through appropriate corrective action. Contact Int'l Corp., B-237122.2, May 17, 1990, 90-1 CPD ¶ 481. With respect to the question of an auction, we also stated in

the decision that the agency had represented to our Office that it had a variety of changes in its requirements. We indicated that the agency's changed requirements, along with the passage of time, would lessen the potential for an auction.

After our second decision, the Air Force issued amendment No. 3 to the RFP. The amendment called for the submission of revised offers no later than 3:00 p.m. on August 1. Subsequent to the issuance of the amendment, Servrite requested a site visit which was conducted on July 18, apparently without prior notice to the incumbent contractor, Contact. On July 30, Contact filed a protest with our Office alleging an improper auction on the part of the agency and also alleging that the agency had engaged in improper technical transgression by allowing Servrite to conduct a site visit without Contact being first informed of the time and date upon which it would occur. On August 2, after the time and date set for the submission of revised offers, the agency received a parcel at its facility which apparently was Contact's offer. By facsimile transmission dated August 2, the agency informed Contact that it would not consider the firm's late revised offer. On August 3, Contact filed a protest with the agency arguing that its offer should be considered. On September 13, the agency denied Contact's agency-level protest and, on September 21, the firm protested the rejection of its revised offer to our Office.

Contact first argues that the terms of the Air Force's amendment to the RFP will result in an impermissible auction. Specifically, Contact argues that, despite its representations to the contrary, the agency has made no changes in the amended RFP which will have a significant cost impact on the prices which will now be offered and that, since both firms' prices were previously revealed during the earlier protest, an auction situation exists. In support of its argument, Contact states that the agency has changed the oil ingredient requirement under the RFP from coconut oil to rapeseed oil and has furnished our Office with a modification of another contract which shows that this same change had been effected under that contract without any adjustment to cost. In addition, Contact argues that the agency's minor additions and deletions of certain line items<sup>1/</sup> will only result in a net total adjustment to the firm's offer of some \$6,500, which is less than one-half of 1 percent of the total contract price. Finally, Contact states that the Air force has decided not to have the contractor furnish non-fat dry milk despite the agency's contrary representations to our Office.

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<sup>1/</sup> Nine line items were deleted and one added.

The Air Force responds that its primary purpose for amending the RFP and seeking BAFOs from competing firms was to remedy an earlier impropriety in its acquisition process, namely, the improper conduct of discussions with only one firm. In addition, the Air Force states that it had previously represented in good faith its intention to require contractors to furnish non-fat dry milk based upon information which led it to question the reliability of its source for this milk, but that, subsequent to the resolution of the earlier protest, it was able to secure a reliable source for the milk. In support of this assertion, the Air Force has supplied our Office with a series of correspondence discussing the initial concern over a reliable source for the milk and directing contracting agencies to develop alternate sources. The correspondence also discusses the subsequent resolution of the problem. Finally, the Air Force also argues that the other minor changes made by the amendment, as well as the passage of time, ameliorate the potential for an auction.

In our earlier decision, Contact Int'l Corp., B-237122.2, supra, we stated our agreement with the Air Force's proposed corrective action, concluding that the agency had improperly conducted discussions with only Servrite. In that decision, we specifically indicated, with respect to the potential risk of an auction, that such a risk was secondary to the need to preserve the integrity of the competitive procurement process through appropriate corrective action. While we did take note of certain changed requirements which appeared at the time to be factors which would mitigate the potential for an auction situation, those factors were not central to our decision in that case. In this respect, we emphasize that, especially in circumstances where an agency's actions have resulted in the violation of an explicit statutory requirement, the need to preserve the integrity of the competitive procurement process, even at the possible risk of an auction situation, is paramount. See RGI, Inc.--Recon., B-237868.2, Aug. 13, 1990, 90-2 CPD ¶ 120; Cubic Corp.--Recon., B-228026.2, Feb. 22, 1988, 88-1 CPD ¶ 174.

Here, the Air Force's actions in conducting discussions only with Servrite amounted to an explicit violation of 10 U.S.C. § 2305(b)(4)(B) (1988) which requires an agency to engage in discussions with all responsible offerors within the competitive range. In addition, we are satisfied by the present record that the Air Force represented in good faith its initial intention to require contractors to furnish non-fat dry milk under the revised RFP. Finally, we are persuaded

that the minor changes made by the Air Force in its requirements, coupled with the passage of time, lessen the potential risk for an auction. We therefore see no basis to sustain Contact's protest on this ground.

Contact next argues that the agency engaged in improper technical transfusion by permitting Servrite an opportunity to tour the subject facility without prior notice to Contact. Specifically, Contact alleges that the agency conducted an unannounced site visit with Servrite. According to Contact, the agency's improper conduct of a site visit without first providing notice to Contact resulted in there being a technical transfusion between the two firms since Servrite was able to observe Contact's operations at the facility. Contact alleges that Servrite was able to learn who Contact's suppliers are and what maintenance work had been performed on the various pieces of equipment at the facility. Contact alleges that this information provided Servrite with a competitive advantage.

The agency responds that it was not required to provide Contact with notice of Servrite's site visit. In addition, the agency argues that Servrite was not provided any material during the site visit (for example, Contact's laboratory records) which might have provided the firm with an improper competitive advantage.

As a initial matter, we point out that the concept of technical transfusion refers to an improper disclosure by agency officials of information contained in one firm's proposal which results in the improvement of a competing proposal. See FAR § 15.610(d)(2) (FAC 84-16). Given the fact that the alleged disclosure in this case occurred during a site visit to a government-owned facility, and was therefore presumably the result of one firm being afforded an opportunity to view a competitor engaged in the performance of work previously contracted for, we think that the concept of technical transfusion is inapplicable to these circumstances. In any event, we find that nothing improper has occurred in this case. First, we agree with the agency that there is no legal requirement that it provide notice to an incumbent operating a government-owned facility prior to conducting a site visit with another firm interested in competing for the requirement. Second, Contact has provided our Office with no evidence which would tend to suggest that the Air Force, either directly or indirectly, provided Servrite with information which was contained in Contact's proposal or which was otherwise proprietary. We point out that the site visit was conducted at a government-owned facility in which virtually all of the equipment was owned by the government. We also point out that Contact has failed to demonstrate how viewing its operation of the facility would in any way have

provided Servrite information relating to the particular contents of its subsequent proposal or would have provided Servrite with information which legally could not have been disclosed. Under these circumstances, we deny this basis of Contact's protest.

Finally, Contact argues that the agency has improperly rejected as late its revised offer in response to the amended solicitation. In this respect, Contact argues that the agency is required to accept the firm's revised offer pursuant to FAR § 52.215-36(e) (FAC 84-58), which provides that a late modification of an otherwise successful proposal which makes the terms of the offer more favorable to the government may be accepted at any time. According to Contact, it had previously submitted the "otherwise successful" offer under the original solicitation (and had been awarded a contract as a result), and its revised offer is simply a modification thereof. Contact also argues that the agency is required to consider its revised offer because only two firms submitted offers under the revised RFP. In this regard, Contact directs our attention to a prior decision of this Office, Consolidated Devices, Inc., B-232651, Dec. 20, 1988, 88-2 CPD ¶ 606, in which we found that a firm submitting a late offer where only one other firm was competing was an interested party to maintain a protest.

First, despite Contact's assertion to the contrary, the firm did not submit an "otherwise successful proposal" as contemplated by FAR § 52.215-36(e). Although Contact was in fact awarded a contract pursuant to its original offer, our Office concluded that the award was improper because the Air Force had engaged in improper discussions prior to the award. Consequently, there is no basis to conclude that Contact was, either at the time of the initial award or at any subsequent time, the "otherwise successful offeror." Moreover, Contact has not even alleged, much less demonstrated, that its revised offer was an offer of terms more favorable than the terms of its original offer. See FAR § 52.215-36(e). Second, we think that Contact's reliance upon Consolidated Devices, Inc., B-232651 *supra*, is misplaced. In that case, we concluded that one of only two firms submitting an offer was an interested party for purposes of protesting the propriety of an agency's award decision even though the protester's offer was late. That case does not, however, stand for the proposition suggested by Contact that an agency is required to accept a late offer where only two firms compete for the acquisition. Under these circumstances, we see no basis to conclude that

Contact's late revised offer should have been accepted by the Air Force.2/

The protests are denied.



James F. Hinchman  
General Counsel

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2/ Contact also alleges for the first time in its comments filed in response to the agency report on November 13, that Servrite's revised offer should have been rejected as "nonresponsive" because it was a below-cost offer. We decline to consider this argument on the merits since it was not timely filed. In this regard we point out that the subject award was made on September 10, and that all parties to the protest were aware of this fact. Since Contact did not diligently pursue the information necessary to formulate its basis of protest, namely, the dollar value of the award, and since it did not file in our Office within 10 days of learning of the award, we view the allegation as untimely. 4 C.F.R. § 21.2(a)(2) (1990); see Douglas Glass Co., B-237752, Feb. 9, 1990, 90-1 CPD ¶ 175.